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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 1054

COMMONWEALTH OF PENNSYLVANIA

v.

CHARLES LaCAMERA, Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Constitutional Statutory and Procedural Rules Provisions Involved	3
Statement of the Case	4
Reason for Granting the Writ	5
The particularity requirement of the Fourth Amendment to the United States Constitution has not been satisfied. Factually, the issue presented here is one of first impression. In this case, the things particularly described were not seized, and the things seized cannot logically be included within the description used.	5
Argument	6
Conclusion	7
Affidavit of Service	8
Appendix A — Opinion and Order of Court on Petition for Writ of Habeas Corpus	9
Appendix B — Opinion and Order of Court on Motions for New Trial and in Arrest of Judgment Based on the Insufficiency of the Evidence	30
Appendix C — Opinion and Order of the Superior Court of Pennsylvania	34
Appendix D — Order of the Supreme Court of Pennsylvania Denying Petition for Allowance of Appeal	39

CASES CITED

Mapp v. Ohio, 367 U. S. 643, 81 Sup. Ct. 1684	7

STATUTE CITED

28 U.S.C., Sec. 1257 (3)	2

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the Commonwealth of Pennsylvania denying petitioner's Petition for Allowance of an Appeal from the decision of the Superior Court of Pennsylvania sustaining the judgment of conviction of the petitioner in the Court of Quarter Sessions of Mercer County, Pennsylvania, on a criminal charge of setting up a lottery.

OPINIONS BELOW

The Supreme Court of the Commonwealth of Pennsylvania denied petitioner's Petition for Allowance of an Appeal without delivering an Opinion.

The Opinion of the Superior Court of the Commonwealth of Pennsylvania is officially reported in 199 Pa. Superior Court Reports at 348, and is Appendix C herein.

The Opinions of the lower court denying petitioner's Petition for a Writ of Habeas Corpus, and Motions for New Trial and in Arrest of Judgment Based on the Insufficiency of the Evidence are not officially reported, but appear hereinafter as Appendices A and B respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3) and Rule 22(1). The final order and judgment of the Supreme Court of the Commonwealth of Pennsylvania was rendered January 16, 1963.

QUESTION PRESENTED

Whether evidence was admissible at a state trial for setting up a lottery, which evidence was secured by a county detective acting with a state search warrant authorizing him to search the petitioner's home and seize "numbers slips," when the evidence of the lottery secured by the search was something other than the thing particularly described in the warrant, the "numbers slips" were not found, the petitioner was not otherwise validly arrested, and the things seized were not in the plain view of the searchers.

CONSTITUTIONAL STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED

1. United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. United States Constitution, Amendment XIV, Section 1:

"* * * nor shall any State deprive any person of life, liberty or property without due process of law; * * *"

STATEMENT OF THE CASE

The petitioner was indicted and convicted at No. 172 June Sessions, 1961, in Mercer County, Pennsylvania, on a charge of setting up a lottery.

Officers had entered the dwelling house of the petitioner by virtue of a search warrant authorizing them to search for and seize "numbers slips." Not finding "numbers slips," they did find and seize a large quantity of Treasury tickets and baseball pool tickets, which are evidence of illegal lotteries involving the use of numbers, but not the particular lottery technically known as the numbers game, a three digit lottery game for which the search warrant was intended. The evidence discovered was found in the cellar underneath some soiled clothing, in paper bags. Finding these things, the officers then arrested the petitioner, and charged him with setting up a lottery.

Petitioner first tested the legality of his arrest in a habeas corpus action wherein, at the outset, he raised the federal constitutional issue claiming that the evidence offered against him at the preliminary hearing had been secured in violation of the Fourth and Fourteenth Amendments to the United States Constitution, and should be suppressed. The court rejected his claim, denied the petition, and remanded the petitioner. Appendix A.

Petitioner then elected to be tried without a jury, offered no evidence in defense, and relied solely on the proposition that the evidence offered against him had been secured in violation of the Fourth Amendment to the United States Constitution (as well as a similar pro-

vision in the Constitution of Pennsylvania, i.e. Article 1, Sec. 8). At his trial, petitioner demurred to the evidence on the grounds stated, and was overruled; he restated his position in a motion for a verdict of acquittal and was denied. He renewed this position in his Motion for a New Trial and in Arrest of Judgment Based on the Insufficiency of the Evidence, and it was again rejected. Appendix B.

Petitioner then appealed to the Superior Court of Pennsylvania at No. 176 April Term, 1962, which case is reported as Commonwealth of Pennsylvania v. LaCamera at 199 Superior Court Reports 348. In this appeal the constitutional claim which he had relied on from the beginning was reasserted and again rejected. Appendix C.

Petitioner then appealed by way of a Petition for Allowance of Appeal in the Pennsylvania Supreme Court at No. 2459 A Miscellaneous Docket, reasserting his constitutional claim. He was denied a hearing. Appendix D. This Petition was denied, without opinion, January 16, 1963, "Per Curiam."

REASON FOR GRANTING THE WRIT

The particularity requirement of the Fourth Amendment to the United States Constitution has not been satisfied. Factually, the issue presented here is one of first impression. In this case, the things particularly described were not seized, and the things seized cannot logically be included within the description used.

ARGUMENT

The Pennsylvania Supreme Court by denying petitioner's Petition for Allowance of Appeal affirmed "Per Curiam," without Opinion, the decision of the Pennsylvania Superior Court, Appendix C, *Commonwealth of Pennsylvania v. LaCamera,* 199 Pa. Superior 348. The effect of these decisions, and the supporting Opinion of the Superior Court of Pennsylvania, is to deny to your petitioner the rights secured to him under the Fourth Amendment to the Constitution of the United States.

The Fourth Amendment to the Federal Constitution requires that a search warrant particularly describe the thing to be seized. In this case a specific description was used in the warrant, *viz*, "numbers slips." The trial court found as a fact that the things described were not seized. In all of the cases cited by the Superior Court in which convictions were sustained, where the particularity requirement of the Amendment was questioned, general, broad descriptions were employed in the warrants, and the things seized were held to be within the scope of the warrant. In all of the other appellate decisions where the particularity issue was raised, and the convictions sustained, the defendant had been otherwise validly arrested, or, the things not described in the warrant — but seized — were in the plain view of the searchers. Such conditions did not exist in this case.

In this case, the lower court in its Opinions tortured the language of the warrant until it embraced the articles seized, although it found as a fact that no "numbers slips" were seized. The Superior Court performed a similar gymnastic feat when it held that "any slip of

paper used in an illegal lottery where the winner is determined by the selection of a number is a numbers slip." In so finding, the court neglected to mention that the trial court had found as a fact that no "numbers slips" were seized.

This case is before this Court for one reason: "The constable blundered." He stumbled onto evidence of a lottery operation, although not the one he anticipated in his warrant, and he and each court that has considered the matter to date has expanded his intent, as evidenced by the language of the warrant, until it has become in effect, "gambling paraphenalia." Such treatment is directly violative of the particularity requirement of the Fourth Amendment.

If the seizure by the state's officer in this case constituted a denial of the petitioner's rights under the Fourth Amendment, as petitioner claims it does, then it constitutes a denial of his rights under the "due process" clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 81 Sup. Ct. 1684.

CONCLUSION

For the reasons set forth herein, I respectfully submit that this petition for a writ of certiorari should be granted.

PEARSE O'CONNOR
Attorney for Petitioner

Affidavit

Commonwealth of Pennsylvania }
County of Allegheny } ss.

Before me, the undersigned authority, personally appeared PEARSE O'CONNOR, ESQUIRE, who being duly sworn acording to law, deposes and says that he made service, by mail, on John Q. Stranahan, District Attorney of Mercer County, Mercer County Court House, Mercer, Pennsylvania, by depositing five (5) printed copies in the U. S. Post Office, by Registered Mail, Special Delivery, postage prepaid.

PEARSE O'CONNOR

Sworn to and subscribed before me this 9th day of April, 1963.

DORIS GALLAGHER
Notary Public
Pittsburgh,
Allegheny County, Pa.

(SEAL)

My Commission Expires May 6, 1964.

APPENDIX A

IN THE
COURT OF COMMON PLEAS
OF MERCER COUNTY, PENNSYLVANIA

COMMONWEALTH, *ex rel.* CHARLES LACAMERA,
v.
GLENN MCDOUGALL, Warden of the Mercer County Jail.

No. 108 December Sessions, 1961.

Opinion (Habeas Corpus).

(Filed November 7, 1961.)

For the Commonwealth: John Q. Stranahan, Esq., District Attorney.

For the Respondent: William D. Irwin, Esq., Pearse O'Connor, Esq.

MCKAY, J.

May the legality of a search warrant for numbers slips be attacked by a petition for a writ of *habeas corpus* after an indictment has been returned in view of the fact that the case of Mapp v. Ohio[1] was decided subsequent thereto? Is it a violation of the search and seizure clause of the Federal and state constitutions for an officer to seize Treasury tickets and baseball pool tickets under a search warrant authorizing a search for numbers slips?

1. 367 U. S. 643. The case holds that in a trial in a state court, evidence obtained by unconstitutional search and seizure is no longer admissible in evidence. The pertinent implications of this decision are discussed *infra*.

These are the interesting questions posed by the petition now before us.

On June 1, 1961, following a search of the defendant's house during which officers found a large quantity of lottery tickets, an information was made against him charging him with being engaged in the operation of a lottery. Following a hearing, the justice bound him over to court and he posted bond for his appearance at the June term of Quarter Sessions Court. On June 6, 1961, he was indicted by the grand jury. He moved to have his trial continued until the September term, which motion was granted.

At the September, 1961, term, his counsel suggested that since his client's defense was a legal one, the case might be tried by the Court without a jury. This was agreed to and October 30, 1961 was set as the date for the trial. Meanwhile, the defendant has been free on bail since June 1.

When th trial was called on October 30, counsel for the defendant requested that the trial be deferred and that the Court hear his petition for a writ of *habeas corpus*. The Commonwealth objected to this procedure, but we granted the request, meanwhile reserving our decision on whether the procedure was appropriate. At the defendant's request, we then terminated his bail and ordered him remanded to custody so that he would be in a legal position to ask for the *habeas corpus* writ. He was returned to court in the custody of the Sheriff and the hearing of the petition was held forthwith. After the hearing, we remanded the defendant to custody, but the following day permitted him to be released again on bail pending our reserved decision whether he should be discharged or required to stand trial.

At the hearing, the Commonwealth called three witnesses, Armando J. Vance, Mercer County Detective; Arnold Fonseca, a State Policeman; and August Angel, a printer. Frederick Frado, a constable, was in court as a witness, but did not testify, the District Attorney stating that he would merely corroborate the testimony of Vance. The Commonwealth's evidence was as follows:

On June 1, 1961, Vance made an affidavit before a justice of the peace wherein he averred that numbers slips were "being delivered or picked up at 917 Fruit Avenue in the City of Farrell and that there was just cause to suspect that numbers slips or some part thereof were concealed in the residence of Mr. and Mrs. Charles LaCamera at that address". He prayed that a search warrant might be issued to search the premises aforesaid for numbers slips.

Pursuant to the affidavit the justice issued a search warrant commanding Vance to search the said premises for "numbers slips" and to bring the person in whose custody he found them before the justice. Accompanied by Constable Frado, Officer Vance proceeded to the defendant's residence at 917 Fruit Avenue and knocked on the front door. The defendant's wife answered the door but did not open it. Instead, she said "Just a minute.", went to a desk in the front room, put some papers in a cardboard box and disappeared into another room. When she did not return to the door, Vance went around the house to the rear door and through the kitchen window saw her come into the kitchen from the cellar. She then admitted the officers through the back door. Vance read the search warrant to her and he and Constable Frado proceeded to search the premises. In the cellar they

found some paper ashes in a small stove, and underneath some soiled clothing, found a small brown paper bag containing seven small bundles or packages of Treasury tickets and a large paper bag containing seven packages of baseball pool tickets. In a china closet on the first floor the officers found a small book with a "rundown" (summary) of runs scored in baseball games.

The defendant came to the house while the officers were still there but after they had completed their search. He examined the search warrant and told them they didn't have anything on him because the warrant reads one thing and they had something else in the bag.

August Angel, the printer, testified that the Treasury tickets had been printed in his shop for the defendant who had paid for them.

The exhibits consisting of the Treasury tickets, baseball pool tickets and the baseball rundown sheet were admitted in evidence over the objection of the defendant.

There is no question that there is ample evidence to sustain the charge against the defendant provided Commonwealth's evidence was not obtained in violation of the Constitutional provisions relating to search and seizure. The defendant contends, however, that it was so obtained, first, because the County Detective did not have probable cause for making the affidavit for search, and second, because the exhibits were obtained by an illegal seizure in that the affidavit and search warrant described the things to be searched for as "number slips" or "numbers slips" whereas the exhibits did not come within that description.

Appendix A.

Before we come to the merits of the constitutional questions raised by the defendant, it is necessary first to dispose of certain formal objections raised by the Commonwealth to the present proceedure.

The first of these is whether the procedure resorted to by the defendant in voluntarily surrendering his person when he was out on bail, this for the sole purpose of having the legality of the evidence against him appraised by the Court in a *habeas corpus* proceeding is proper. This practice has been criticized. In the case of Commonwealth *ex rel.* Reeves v. Skelly, Sheriff, 8 D & C 585, which dealt with that type of procedure, Judge Parker said at page 590: "There is much authority in Pennsylvania for refusing the writ in a case like this, where it appears that the bail is surrendered for the express purpose of securing a *habeas corpus*", citing Commonwealth v. Fenicle, 6 D. R. 789, and Commonwealth v. Walton, 1 Northamp. Co. Reporter 289. In our opinion, however, the defendant has that right. It is axiomatic in the law that if one has a legal right to do a thing, the law will not inquire into his purpose. Here the defendant had the right to surrender himself to the warden and thereafter to petition for a writ of *habeas corpus*.

A more serious objection advanced by the Commonwealth, likewise procedural, is that the present petition for *habeas corpus* has been too long delayed, since the defendant has long since posted bail following his preliminary hearing and has been indicated by the grand jury. There would seem to be merit to this objection, for it is well settled that questions relating to the legality of the arrest and the obtaining of evidence by unlawful search and seizure must be raised by *habeas corpus* proceedings prior to indictment.

Appendix A.

In Commonwealth v. Brennan, 193 Pa. 567, the Supreme Court held that it is too late to attack the legality of a search and seizure after the indictment is found.

In Commonwealth v. Hunsicker, 189 Pa. Super. Ct. 63, in holding that a defendant could not question the sufficiency of the Commonwealth's evidence after he has given bail for court on a petition to quash the information, the Court said, "These defendants when bound over to court might have raised the question of the sufficiency, or the total lack of the evidence to hold them, on *habeas corpus*, but having given bail they can be discharged, before trial, for lack of evidence only by the grand jury."

In Commonwealth v. Connolly, 89 Pa. Super. Ct. 243, the lower court held that it was too late to make an objection (in that case by motion to suppress evidence) to an illegal search and seizure after indictment and the Superior Court did not reverse this holding. In Commonwealth v. Fedulla, 89 Pa. Super. Ct. 244, the defendant moved to quash the indictment on the ground that he had been illegally arrested without a proper warrant in that the prosecutor had not complied with the constitutional provision relating to search and seizure. The Superior Court said at page 246, "It thus appeared there was ample time, before indictment found, for the defendant to challenge the legality of his arrest and being held for trial to answer the charge by a proceeding to be discharged from custody, or to be released from his recognizance and discharged without day. Instead of doing this he waited until he was called for trial, when he moved to quash the indictment upon the ground of il-

legality of his arrest; it was too late to raise the question by a motion to quash the indictment."

But the defendant contends that he is excused for his delay because of the decision of the United States Supreme Court in Mapp v. Ohio, *supra*, which was not decided until after the indictment was returned. The Mapp case was decided June 19, 1961.

In order properly to appraise this contention, it is necessary to look briefly at the Mapp case in the perspective of other Federal and Pennsylvania decisions and procedures dealing with the search and seizure provisions of the Constitutions of the United States and of Pennsylvania.

That provision is contained in both the Fourth Amendment to the Constitution of the United States and Article 1, Section 8 of the Constitution of Pennsylvania in identical terms as follows:

> "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant."

The Fourth Amendment, of course, is a limitation on the Government of the United States, and not on state governments.

The Fourteenth Amendment, however, is a direct limitation on state governments. It provides that "Nor shall any state deprive any person of life, liberty or property, without due process of law."

Appendix A.

Prior to the Mapp case the United States Supreme Court had held that, so far as Federal courts were concerned, evidence obtained by illegal search and seizure was not admissible at the trial.[2] That court, however, had never required state courts to adopt the exclusionary rule, as it could have done, by holding, under the Fourteenth Amendment, that the use of illegally obtained evidence at a trial in a state court deprived a defendant of due process of law. Instead, state courts were free to permit such evidence to be admitted[3] if they saw fit, and many did.

The Mapp case, however, overruled the Wolf case and explicitly held that for a state court to admit at a trial evidence obtained by illegal search and seizure as set forth in the Fourth Amendment is a denial of a defendant's rights under the due process clause of the Fourteenth Amendment.

It does not necessarily follow, however, that even in the Federal courts the raising of the question whether evidence has been obtained by illegal search and seizure can be deferred until the trial of the case. On the contrary, the Federal courts early adopted a procedure whereby that question was required to be raised prior to the trial by a motion to suppress the evidence. This procedure has been incorporated into the Federal Rules

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2. Weeks v. United States, 232 U. S. 383 (1914). This rule is sometimes referred to as the exclusionary rule.

3. Wolf v. People of the State of Colorado, 338 U. S. 25 (1949).

of Criminal Procedure as Rule 41 (e).[4] Hence, in the Federal courts, while a defendant has long had the right to have illegally obtained evidence excluded, he had to assert the right before the trial or he lost it.

The United States Supreme Court has never undertaken to prescribe the detailed procedures whereby state courts must provide protection to defendants of any of the rights guaranteed under the due process clause. Instead it has held that it is for the states themselves to choose their own procedures for that purpose. It said in Carter v. Illinois, 329 U. S. 173:

> "The Constitution commands the States to assure fair judgment. Procedural details for securing fairness is left to the States. It is for them, therefore, to choose the methods and practices by which crime is brought to book, as long as they observe those ultimate dignities of man which the United States Constitution assured."

In the same case the court specifically approved of a petition for a writ of *habeas corpus* as an appropriate method of challenging any violation of Constitutional rights when it said, at page 175: "A state may provide that the protection of rights granted by the Federal Constitution be sought through the writ of *habeas corpus* or *coram nobis*."

Summarizing these matters, it said on page 176: "So long as the rights under the United States Consti-

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4. Under Rule 41 (e) there is one exception. The question may be raised for the first time at the trial in the exceptional situation: where the defendant was not previously aware of the grounds for a motion to suppress.

tution may be pursued it is for a State and not for this Court to define the mode by which they may be vindicated."

The Pennsylvania Superior Court echoed the same principle when it stated in Hiffert v. Pennsylvania Central Brewing Company, 141 Pa. Super. Ct. 543, at page 548:

> "The Fourteenth Amendment to the Federal Constitution does not undertake to control the power of the States to determine by what process legal rights may be asserted or legal obligations enforced, or what form, procedure and practice shall take, so long as the above elements (notice, an opportunity to present one's cause, a proceeding appropriate to the character of the particular present case, and the adjudication of the same nature as is present in other cases) are present."

It follows that the Mapp case neither holds nor implies that Pennsylvania is required to adopt either the Federal or any other particular procedure to assure the right of a defendant to have illegally obtained evidence excluded at his trial. As we have noted, the Federal courts effect this result by a motion to suppress, which must be made prior to trial or it is too late.

Hence the time honored Pennsylvania method of challenging evidence obtained by unlawful search and seizure by *habeas corpus*,[5] which is very similar to the Federal motion to suppress, is the kind of procedure which a state court may use in assuring the right of a

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5. An example of such use of the writ is Commonwealth *ex rel.* Kohler v. Turnkey, 3 D & C 633.

defendant to challenge that type of evidence. In fact, as we have noted, the Carter case specifically refers to *habeas corpus* as an example of an appropriate procedure to enforce any Federal Constitutional right in a state court.

When the Pennsylvania procedure requires the writ of *habeas corpus* to be applied for prior to indictment, it is merely asking for the same kind of reasonable time limitation that Rule 41 (e) applies when it provides that a motion to suppress be presented prior to trial. In each case, the constitutional right to exclue illegally obtained evidence is fully vindicated provided the reasonably required steps to assert the right are seasonably taken.

As we see it, the Mapp case adds no rights to those which the defendant in the present case already had except the specific creation of a Federal question in case a timely petition for *habeas corpus* had been presented and improperly refused and the illegal evidence were admitted at the trial.

This defendant could have raised every question he now raises in June, 1961, following his arrest by a petition for *habeas corpus*, which, if it had merit, would have resulted in him being discharged then and the objectionable evidence could not thereafter have been received against him, as was done in the Kohler case, *supra*. Having failed to present his petition before indictment, he cannot present it now, four months after his indictment. Nor can he, by analogy to the provision in Rule 41 (e), which permits a late motion to suppress when a defendant was previously unaware of the facts, claim that he did not know in June that the evidence was illegally seized, for he was present when the search was made and

pointed out to the officers that they "had nothing on him" since the search warrant described one thing and they had seized something else—the same issue which he is raising now by his petition.

Accordingly, the petition is presented too late and must now be dismissed for that reason.

Notwithstanding the above, we have considered the case on its merits.

The Fourth Amendment to the Constitution of the United States and Article I, Section of the Constitution of Pennsylvania, as quoted, *supra*, page 8, provide *inter alia*, that no warrant to search any place or to seize any persons or things shall issue without describing them as nearly as may be, nor without probable cause.

The first contention of the defendant is that the search warrant in the present case was issued without probable cause.

The affidavit sets forth, as the basis of its request for a warrant, that "numbers slips" are "being delivered or picked up at 917 Fruit Avenue in the City of Farrell", and that "there is just cause to suspect that numbers slips or some part thereof are concealed in the residence of Mr. and Mrs. Charles LaCamera at that address."

In addition, at the hearing, Officer Vance testified that he had received numerous telephone calls that the defendant was in the gambling business, that he had observed the defendant's house on several days, that he knew the defendant was "making a living from this kind of action", and that he told all this to the justice of the peace who issued the warrant.

Appendix A.

The requirements of an affidavit for a search warrant under the Pennsylvania Constitution are set forth in the case of Com. v. Schwartz, 82 Pa. Super. Ct. 369 at page 374, where the opinion of Judge Keller states that, where a statute does not require more, it is sufficient to set forth "that there is probable cause to believe and that he has just and reasonable grounds to believe and does believe, etc." The opinion goes on to say (at page 375):

> "Probable cause does not import absolute certainty. It only implies reasonable grounds for belief, and the justice issuing the search warrant is the authority to be satisfied that probable cause exists."

The Federal law is to the same effect. In the Federal courts it is the United States Commissioner who must be satisfied, and, in the absence of arbitrary exercise, his judgment is conclusive as to whether probable cause exists. Merritt v. U. S., 249 F. (2d) 19; U. S. v. Joseph, 174 F. Supp. 539, affirmed, 278 F. (2d) 504.

The statement in the affidavit that numbers slips were being picked up or delivered at the defendant's house goes farther than the general requirement stated by Judge Keller in the Schwartz case. It is factual and unequivocal, and if true, would warrant the conclusion that a search of the premises would disclose numbers slips. True the evidence of the alleged fact is not set forth in detail, but that is not required. Since, in addition, the officer told the justice the basis for his averment and apparently satisfied him thereby that it was true, it could not be said that the justice issued the warrant arbitrarily. It follows that there was reasonable cause for the issuance of the warrant.

The second issue raised by the defendant's petition is whether the seized exhibits were described "as nearly as may be" in the affidavit. It must be conceded that the term "numbers slip" narrowly construed is not exactly the same thing as a Treasury ticket or a baseball pool ticket. A numbers slip, under the evidence, is a slip issued to a buyer by a seller in an operation known as the "Numbers Game" or "Numbers Racket" whereon the buyer writes a three digit number, selected by him at random, and turns it in to the seller with the price for it. The seller turns the slip over to a "pickup man" who in turn turns it over to the "banker", and whether the buyer wins the lottery prize or not depends upon whether his number coincides with a certain pre-arranged combination of numbers appearing in the total stock transactions on the New York stock exchange for that day.[6] "Numbers slips", construed narrowly, have a recognized meaning among those who deal in them and the police, a meaning which is distinct from Treasury tickets or baseball pool tickets, although the latter operations are similar in many respects to the numbers game in which the slips are used.

Treasury tickets are tickets in a lottery (this one was entitled Empire) wherein the winner is determined by a number. The winning number is ascertained from U. S. Treasury transactions for the week. Each ticket likewise contains a five digit number and sells for $1.00. Baseball pool tickets are also tickets in a lottery wherein

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6. In one form of the operation race track results are used instead of stock transactions. There are many variations of this game including dispensing with slips entirely and calling the numbers to the seller on the telephone.

the winner is determined by a number. The tickets are sold for 25c and 50c, they also contain numbers and the winning number is determined by the number of runs scored by certain specified professional baseball teams on a given day.

On the other hand, numbers slips, Treasury tickets and baseball pool tickets have this in common, that they are all lotteries in which the participant buys a number and the winner in the lottery is determined by a lucky number. In other words, in a broad sense, both operations are "numbers operations". Under the circumstances of this case, the term "numbers slips" contained in this affidavit and search warrant was actually meant by Officer Vance to have the broader meaning, *i.e.*, to include any slip or ticket or other paper purchased by a player in any illegal operation based on numbers. The officer so testified and Officer Fonseca testified that the Treasury ticket operation was a numbers operation or numbers game though not the numbers game which "we (the witness and counsel for defendant) were discussing", *i.e.*, the game in its narrower sense.

In this connection it must be remembered that "in a search of a gambling establishment the same descriptive particularity is not necessary (under the Fourth Amendment to the United States Constitution) as in the case, for instance, of stolen goods." U. S. v. Joseph, *supra*, citing Nuckolo v. U. S., 99 F. 2d 353.

In the case of Steele v. U. S. No. 1, 267 U.S. 498, the search warrant called merely for "cases of whiskey". The officers seized 150 cases of whiskey, 92 *bags* of whiskey, 15 gallon cans of *alcohol*, 33 cases of *gin*, etc., and a corking machine. The United States Supreme Court

held that the description in the search warrant of "cases of whiskey" was "quite enough" to include the other exhibits.

In the case of U. S. v. Joseph, U. S. D. C., E. Dist. Pa. 1959, 174 F. Sup. 539, under a search warrant for "lottery slips, rundown sheets, records and other paraphernalia and equipment which are being used in violation of laws forbidding lotteries", Federal agents seized money.

The court said that the money was necessary for the wagering business and added (p. 544):

> "It may be added that even were the money not within the description on the search warrant of the things to be seized, its seizure in these circumstances was still clearly proper. It is permissible to seize things other than those described in the search warrant if they have a reasonable relation to the purpose of the search."

Bryant v. U. S.,[7] 252 F. 2d 746; Sanders v. U. S.,[8] 238 F. 2d 145; Palmer v. U. S.[9] 203 F. 2d 66.

In the case of Commonwealth v. Swartz, 82 Pa. Super. Ct. 369, at page 372, the Superior Court of Penn-

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7. In the Bryant case the search warrant was for heroin only. The agents seized gelatin capsules and milk sugar, an ingredient used for diluting narcotics.

8. In Sanders, a bank robbery case, the warrant referred to currency, coins, tools, equipment and clothing. The agents seized three gas masks and some safe manuals.

9. In Palmer, the agents seized pistols while searching under a warrant for narcotics.

sylvania recognizes the difficulty of requiring particularity in the description of gambling implements. The Court states:

> "Until the passage of the statutes providing for searches in aid of the enforcement of our laws against gambling, obscene literature, etc., search warrants in this state were for the most part confined to stolen goods, which the owner was seeking to recover and was therefore able to describe with some particularity and detail. Such particularity cannot reasonably be required as to intoxicating liquors or apparatus used in their manufacture, gambling implements, obscene literature and like articles possessed by a criminal in violation of the law, which the affiant not having owned or had in his possession, cannot be expected to describe with the same detail as in the case of stolen goods. It is therefore sufficient to describe them as intoxicating liquors, implements and materials designed and constructed for the manufacture of intoxicating liquors, gambling implements, etc., without more, nor is it necessary for the affiant to guess as to the various kinds of intoxicating liquors, their quantity, or the character of the apparatus used in their manufacture, which may be concealed on the premises to be searched."

But there is a more compelling reason why, under the search and seizure clause of the Federal and State Constitutions, the affidavit and warrant were sufficient to support the seizure of the Treasury tickets and baseball pool tickets. It will be noted that the search and seizure clause of the Federal and State Constitutions does not purport to bar all searches and seizures under

warrants containing too meager descriptions nor even searches and seizures without any warrant whatever. It is only *unreasonable* searches and seizures that come within the interdict of this amendment, Harris v. U. S., 331 U. S. 147.

When is a search or seizure unreasonable?

There is no exact formula for determining reasonableness; each case depends upon its own facts and circumstances, U. S. v. Rabinowitz, 339 U. S. 56; Smith v. U. S., 254 F. (2d) 751, certiorari denied, 357 U. S. 937.

The Federal Courts have held that a search is unreasonable within the meaning of the amendment only when it is out of proportion to the end sought, Zimmerman v. Wilson, 105 F. 2d 583.

Also that whether a particular search and seizure are unreasonable depends on whether what was done and found bears a reasonable relation to authority then possessed and exercised or transcends it to become oppression, U. S. v. Hotchkiss, 60 U. S. Supp. 405.

The law of Pennsylvania is in accord with the above decisions. In Commonwealth v. Dugan, *et al.*, 143 P. Super. Ct. 383, the Court said at page 386:

> "This section does not forbid searches and seizures without a warrant, but is only directed against unreasonable searches and seizures. What is unreasonable is left to judicial determination."

In the Harris case, *supra*,[10] officers investigating a mail fraud matter, obtained a search warrant to search the defendant's premises for checks. In so doing they

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10. Harris v. U. S., 331 U. S. 147, *supra*.

came upon some Selective Service certificates, the possession of which was a crime. They thereupon prosecuted him for that violation, and offered the certificates in evidence. He was convicted, he appealed, and the conviction was affirmed. (Prior to the trial he had moved for suppression of the evidence and had been refused.)

In sustaining the conviction, the Supreme Court said in its opinion, at page 155:

> "If entry upon the premises be authorized and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement agents of government property, the possession of which is a crime,[11] even though the officers are not aware that such property is on the premises when the search is initiated."

It has even been held, that with respect to gambling paraphernalia, a police officer can remove on sight such items whether he has a search warrant or not, Comm. v. Grant, 57 Dauph. 373.

Applying these principles to the present case, even if we were to restrict the meaning of "numbers slips" as contained in the search warrant to its narrow sense, we have a situation in which an officer armed with a valid search warrant to search for numbers slips calls at the home of the defendant, the defendant's wife delays admitting the officer and in the meantime puts some

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11. In Pennsylvania the possessions of lottery tickets with intent to sell is a misdemeanor. Act of 1939, June 24, P. L. 872, Sec. 602, as amended, 18 P. S. 4602. The quantity of Treasury and baseball pool tickets found in the defendant's possession was so large as to indicate an intent to sell.

papers in a cardboard box and goes to the basement where, it could be inferred, she destroys by burning in a stove all the numbers slips in her possession; while on this legal search the officer finds a large number of Treasury tickets and baseball pool tickets which are at the very least of the same general character of illegality as the numbers slips, and thereupon confiscates them.

Even if Officer Vance were looking only for numbers slips (in the limited sense) that morning, would any ordinary reasonable person standing in his shoes and having equally in mind the protection of the full constitutional rights of the defendant and the purpose of the search, leave the numbers play tickets where he had found them and return to the justice for another search warrant, which would particularly describe them as Treasury and baseball tickets? It appears to us that the answer must so certainly be no that any other answer would not make sense.

We hold, therefore, that the seizure made in this case was not unreasonable under the circumstances. Our decision of the controlling question in the instant case, if the merits of the case are to be considered is, to borrow and paraphrase a pertinent comment of Mr. Justice Clark in the Mapp opinion, not only good law but good sense as well, and, after all, what is the law but common sense?

Hence, whether we consider the present petition with respect to procedural defects or on its merits, our conclusion is the same—it must be dismissed.

Appendix A.

ORDER

Now, November 7, 1961, it is ordered that the petition for *habeas corpus* be dismissed and the case be set down for early trial by the court without a jury as heretofore agreed to.

BY THE COURT:

/S/ McKAY, *J.*

EXCEPTION.

Now, November 7, 1961, the above named defendant excepts to the above order and an exception is sealed.

/S/ LEO H. McKAY (SEAL)

APPENDIX B

IN THE
COURT OF QUARTER SESSIONS
OF MERCER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, v. CHARLES LACAMERA.	No. 172 June Sessions, 1961.

Opinion (Trial).

(Filed March 16, 1962.)

For the Commonwealth: John Q. Stranahan, Esq., District Attorney.

For the Defendant: William D. Irwin, Esq., Pearse O'Connor, Esq.

McKAY, J.

The defendant has moved for a new trial and in arrest of judgment following his conviction of being engaged in the operation of a lottery.

On June 1, 1961, officers searched the defendant's residence under a search warrant for "numbers slips". They found no "numbers slips" on his premises, but they did find and seize a large quantity of Treasury tickets and baseball pool tickets, which are evidence of illegal lotteries involving the use of numbers but not the particular lottery technically known as the numbers game, a three digit number lottery game for which the search warrant was probably intended. It may be of some significance that the admission of the officers into the premises was delayed while the defendant's wife burned

certain papers in a stove in the basement before she opened the door and admitted the officers to the house.

The contention of the defendant in the present motions is that the evidence upon which he was convicted was not legally seized in that the search warrant under which the officers acted did not particularly describe the things which they seized, and, hence the "thing to be seized" as is required by both the federal and state constitutions.

A more exact statement of the issue is whether officers while lawfully searching premises under a valid search warrant describing "numbers slips" may lawfully seize Treasury tickets and baseball pool tickets, slips which are commonly used in conducting a somewhat similar type of lottery in which the winner is also determined by numbers.

The law is settled that they may do so if the seizure is a reasonable one. Harris v. U. S., 331 U.S. 147; Robertson v. State, 221 S. W. 2d 520, 522; Commonwealth v. Dugan, *et al.*, 143 Pa. Super. Ct. 383, 386.

In our opinion dismissing the writ of *habeas corpus* in the present case, filed November 7, 1961, we held that under the circumstances that prevailed at the time the officers confiscated the tickets, the seizure was a reasonable one. We incorporate that portion of that opinion herein by reference, as we now reaffirm our original holding on the key issue in the present motions.

In addition, it may be noted that in Marron v. U. S., 275 U. S. 192; 42 S. Ct. 74, the law is stated that entry under and by authority of a search warrant is not generally regarded as precluding a legal seizure of instru-

ments or of articles connected with another offense being actually committed on the premises entered and discovered by the searching officer, or of articles of a contraband nature.

The above principle would be especially applicable to the instant case where the type of lottery for which the search warrant was issued is very similar to the one in which the seized evidence was used.

The instant case is comparable, both in its facts and in principle, to that of U. S. v. Old Dominion Warehouse, 10 F. 2d 736 (C. C. A. 2d 1926). In that case, the search warrant described the property as liquor driven into the warehouse on a certain truck. The evidence seized consisted of other liquor and a corking machine. The court (Hand, J.) held that the evidence seized was properly admissible, stating:

> "If we suppose the case of goods which we are more used to thinking of as inherently contraband, like a burglar's kit or counterfeiting paraphernalia, the case appears to us plain. We cannot suppose that, if an officer entered lawfully upon a warrant limited to certain described articles of this kind, he would not be justified in taking without warrant any others which he might chance upon in the premises. His seizure would not depend upon the warrant, but upon the fact that they were in their nature *caput lupi*, it would be as little an 'unreasonable seizure' as to take property from a person arrested."

So, in the instant case, the officers in serving a search warrant for "numbers slips", *i.e.*, slips used in the conducting of the well-known lottery based upon three digit numbers, could lawfully seize Treasury tickets and

baseball poll tickets which they find on the premises—they being slips used in conducting a very similar lottery in which the number of the ticket held is the determining factor in ascertaining the winner of the lottery.

ORDER

Now, March 16, 1962, the defendant's motion in arrest of judgment is overruled.

BY THE COURT:

/S McKAY, J.

EXCEPTION

Now, March 16, 1962, the above named defendant excepts to the above order and an exception is sealed.

/S LEO H. McKAY, J. [SEAL]

ORDER

Now, March 16, 1962, the defendant's motion for a new trial is overruled.

BY THE COURT:

/S McKAY, J.

EXCEPTION

Now, March 16, 1962, the above named defendant excepts to the above order and an exception is sealed.

/S LEO H. McKAY, J. [SEAL]

APPENDIX C

IN THE
SUPERIOR COURT
OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	No. 176
v.	April Term,
CHARLES LACAMERA, Appellant.	1962

Appeal From the Judgment of the Court of Quarter Sessions of Mercer County at No. 172 June Term, 1961

Filed November 15, 1962

Opinion by ERVIN, J.

The question to be determined in this appeal is whether police officers, while lawfully searching premises under a valid search warrant describing "numbers slips," may lawfully seize treasury tickets and baseball pool tickets, slips which are commonly used in conducting a somewhat similar type of lottery in which the winner is also determined by numbers.

On June 1, 1961 a county detective obtained a search warrant from a justice of the peace, authorizing him to search the premises of the defendant for "numbers slips." When the officers knocked on the door the defendant's wife answered but did not open the door. Instead she said, "Just a minute"; went to a desk in the front room; put some papers in a cardboard box and disappeared into another room. When she did not return to the door, the officers went around the house to

the rear door and through the kitchen window saw her come into the kitchen from the cellar. She then admitted the officers through the back door. The search warrant was read to her and one of the officers proceeded to search the premises. In the cellar they found some paper ashes in a small stove and underneath some soiled clothing found a small brown paper box containing seven small packages of treasury tickets and a large paper bag containing seven packages of baseball pool tickets. In a china closet on the first floor the officers found a small book with a "rundown" (summary) of runs scored in baseball games. The defendant came to the house while the officers were still there but after they had completed their search. He examined the search warrant and told them they didn't have anything on him because the warrant read one thing and they had something else in the bag.

August Angel, a printer, testified that the treasury tickets had been printed in his shop for the defendant, who paid for them. The exhibits, consisting of the treasury tickets, baseball pool tickets and the baseball rundown sheet, were admitted in evidence over the objection of the defendant. No evidence was presented by the defendant, his only contention being that the evidence was obtained by an illegal seizure in that the affidavit and search warrant described the things to be searched for as "number slips" or "numbers slips" whereas the exhibits did not come within that description.

The Commonwealth produced Detective Vance, who testified that he considered numbers slips in the broad sense of the word to mean any illegal numbers activity

regardless of whether it was the commonly known three digit form of "numbers racket" or other forms of slips based on the Treasury balance. The Commonwealth also produced a State Policeman who was qualified as an expert and he testified that he believed treasury tickets were a form of "numbers slips" in the broad sense of the word. The distinction between the three digit number selected by the player and the five digit number assigned to the player, both of which numbers are picked at random, is a nebulous distinction. We are of the opinion that any slip of paper used in an illegal lottery where the winner is determined by the selection of a number is a "numbers slip."

Even though we should make a distinction between a "numbers slip" and a treasury ticket or baseball pool, we still believe that the evidence obtained in this case was properly admitted and was sufficient to justify a conviction. In Com. v. Schwartz, 82 Pa. Superior Ct. 369, we pointed out that the initial purpose of a search warrant was to recover stolen goods. In such a case the owner having had possession of the goods was required to describe them with a considerable degree of particularity. However, such particularity should not be required in a case such as the one now before us since the affiant has neither owned nor had in his possession the gambling paraphernalia and therefore cannot be expected to describe it with the same particularity as in the case of goods which had been stolen from him. At page 373 Judge Keller, later President Judge, said: "It is, therefore, sufficient to describe them as intoxicating liquors; implements and materials designed and intended for the manufacture of intoxicating liquors;

gaming implements, etc., without more; nor is it necessary for the affiant to guess at the various kinds of intoxicating liquors, their quantity, or the character of the apparatus used in their manufacture, etc., which may be concealed on the premises to be searched. In such cases a general description is within the language of the Constitution; for it is not practicable to give any other: . . ."

In United States v. Joseph, 174 F. Supp. 539, 545, the court stated: "It is permissible to seize things other than those described in a search warrant if they have a reasonable relation to the purpose of the search." In this case the Federal agents seized money, even though under the search warrant they were searching for lottery slips, rundown sheets, records and other paraphernalia and equipment which were being used in violation of the law forbidding lotteries.

In the case of Steele v. United States, 267 U.S. 498, the search warrant named merely "cases of whiskey." The officers seized 150 cases of whiskey, 92 bags of whiskey, 15 gallon cans of alcohol, 3 cases of gin and a corking machine. The United States Supreme Court held that the description in the search warrant, "cases of whiskey," was "quite enough" to include the other exhibits.

In Nuckols v. United States, 99 F. 2d 353, the search warrant authorized a search for gambling tables, race horse slips and gambling paraphernalia. Certain "betting slips" were seized. On page 355 of the opinion the Court stated: "In the search of a gambling establishment the same descriptive particularity is not necessary as in the case of stolen goods."

In the case of Palmer v. United States, 203 F. 2d 66, the agents seized pistols while searching under a warrant for narcotics.

In the case of Sanders v. United States, 238 F. 2d 145, a bank robbery case, the warrant referred to currency, coins, tools, equipment and clothing. The agents seized three gas masks and some safe manuals.

In the case of Bryant v. United States, 252 F. 2d 746, the search warrant was for heroin only. The agents seized gelatin capsules and milk sugar, an ingredient used for diluting narcotics.

In all of these cases the items seized, although not specifically mentioned in the warrant, were admitted in evidence.

Counsel for appellant cites the case of United States v. Lefkowitz, 285 U.S. 452. In that case the government agents, without a search warrant, ransacked an office looking for evidence which might aid in the conviction of the defendants of a crime. The search was obviously an exploration by them in an effort to find some reason for arresting the defendants. At page 465 the Court stated: "The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime from searches such as those made . . . for the seizure of countereit coins, burglars' tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime."

We are of the opinion that the search in the present case was not unreasonable and was not out of proportion to the purpose for which the search was conducted.

Judgment of sentence affirmed.

APPENDIX D

Copy of Judgment of Pennsylvania Supreme Court

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PATRICK N. BOLSINGER
Prothonotary

HELEN D. STEELE
Deputy Prothonotary

January 17, 1963

Pearse O'Connor, Esq.
5177 Liberty Avenue
Pittsburgh 24, Pennsylvania

Re: Commonwealth v. Charles LaCamera
No. 2459A Miscellaneous Docket

Dear Mr. O'Connor:

Please be advised that the Court has entered the following Order on the Petition for Allowance of Appeal filed in the above matter:

"January 16, 1963
Petition denied.
Per Curiam"

Very truly yours,

PATRICK N. BOLSINGER
Prothonotary